IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.3767 OF 2006

IN

APPEAL (L) NO.835 OF 2006

AND

APPEAL (L) NO.835 OF 2006

IN

SUIT NO.2034 OF 1996

...

Sushila Rani Jerath ...Appellant

v/s.

Subodhini Chandra Sena

and ors. ...Respondents

...

Mrs.Manjula Rao for the Appellant.

Mr.S.W.Kulkarni for the Respondents.

...

CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 31ST JULY, 2007

P.C.:

1. This notice of motion has been taken out for condonation of delay in filing the Appeal. The delay is of 1079 days. Assuming that there is sufficient cause shown for condonation of delay, we heard the learned counsel for both sides on merits.

2. By this Appeal, the order dated 7th October, 2003 passed by the learned single Judge of this court in Suit No.2034 of 1996 is challenged. By that order in the absence of written statement filed by the Defendant, the suit has been decreed in terms of prayer clauses (a) to (e) & (g). In short, the learned single Judge has decreed the suit and has passed a decree of specific performance of the agreement to sell a flat entered into between the parties to the suit. The appellant/defendant is the owner of the flat. The agreement between the parties

is dated 19th April, 1996, and at that time the Plaintiffs were already in possession of the flat. It transpires that the flat was leased out by the Defendant to the company where the husband of the Plaintiff No.1 was an employee. As the employee of the company that flat was allotted to him for his residence. The landlord-Defendant had moved against the company for a decree of eviction. In that situation, an agreement was arrived at dated 19th April, 1996. The price of the flat as per the agreement was fixed at Rs.1,50,000/-. The amount of Rs.1,50,000/- was agreed to be paid by installments and the Plaintiffs were also to pay all other dues in relation to the flat. The Defendant was to withdraw the suit filed in the Small Causes Court for a decree of eviction. It is common ground that so far as the suit which is mentioned in the agreement of sale is concerned, that suit has been dismissed for default. It appears that a letter was written by the Defendant to the Plaintiff dated 15-10-1996. First paragraph of the letter relates to the proceedings pending in the Small Causes Court and it is stated that an amount of Rs.29,000/- is outstanding. The Plaintiff was called upon to pay that amount. In second paragraph of that letter, a reference is made to the

agreement of sale and it is stated that an amount of Rs.1,50,000/- is to be paid and it is stated that an amount of Rs.29,000/- is still outstanding. That letter was replied to by the Plaintiff. The reply is dated 21st November, 1996. In that letter the Plaintiff gave details of the payment made by the Plaintiff against the agreement of sale as also payment made in relation to the flat with the society. The total payment, according to the Plaintiffs, which was made was Rs.1,78,581.35.

3. By letter dated 21-11-1986, the Defendant informs the Plaintiffs that still an amount of Rs.62,734/- is due and if that amount is not paid within one month the Defendant will cancel the agreement for sale of the flat. The Plaintiffs denied that any amount is due and payable. It was stated that full amount has been paid. It appears that there was further correspondence between the parties. The Defendant was claiming that some amount is outstanding and the Plaintiff No.1 was claiming that the entire amount has been paid. It was pointed out that apart from making payment towards society charges and making payment directly to the Defendant of the agreed price of the flat, the Plaintiff No.1 also made payment of

Rs.25,000/- with interest, which was repayment of the loan taken by the Defendant from the society in relation to the flat.

4. It, thus, appears from the material produced by the Defendant herself on record that full amount of Rs.1,50,000/- has been paid partly directly to the Defendant and partly to the society for clearing the amount of loan taken by the Defendant against the flat. It is clear from the correspondence on record that the Defendant does not dispute that the agreement was entered into. The Defendant also does not dispute the agreed amount of consideration. The only dispute raised in the correspondence is whether the Plaintiff No.1 has made payment of full amount of consideration or not. Even , according to the Defendant, substantial payment admittedly has been received by the Defendant from the Plaintiffs. The dispute was about receipt of amount of Rs.27,000/-, which the Defendant was claiming, was still in balance. However, in our opinion, considering the amount paid by the Plaintiffs to the society for clearing the amount of loan taken against the flat by the Defendant, the Defendant, in our opinion, was not justified in claiming that any amount is due towards

the agreed price of the flat. Thus, there is no dispute on existence of the agreement. There is no dispute on the purchase price agreed between the parties and as we find that the purchase price has also been paid, so far as discretion exercised by the learned single Judge in granting a decree of specific performance is concerned, in our opinion, no fault can be found with the order of the learned single Judge in that regard also, because admittedly the Plaintiffs were in possession of the flat and they had entered into agreement with the Defendant to purchase the flat because proceedings for their eviction from the flat were started. It is to be noted that the agreement of which specific performance has been granted is an agreement to sale immovable property, there is a statutory presumption that breach of any agreement to sale immoveable property cannot be adequately compensated in terms of money. Thus, on merits we do not find any fault with the decree passed by the learned single Judge. Had the decree not been passed in favour of the Plaintiffs, they would have faced eviction from the flat.

5. Taking overall view of the matter, therefore, in

our opinion, it will not be in the interest of justice to condone the delay. Notice of Motion and Appeal are, therefore, disposed of.

6. When it was argued before us that an amount of about Rs.27,000/- still due from the Plaintiff, the learned counsel appearing for the Plaintiffs/Respondents stated that without prejudice to their contention that they have paid full amount which was due to be paid, the Plaintiffs are willing to pay an amount of Rs.1,00,000/- (Rupees One lakh) to the Defendant.

7. In view of the offer made by the Respondents, we had put it to the learned counsel appearing for the Appellant whether on receiving an amount of Rs.1 lakh the Appellant would be willing to withdraw the motion and the appeal. The learned counsel appearing for the Appellant, after taking instructions, informed that the Appellant is not willing to withdraw the appeal.

8. However, in view of the statement made by the learned counsel appearing for the Respondents, in our opinion, following order would meet the ends of

justice.

O R D E R

(i) Respondents to deposit an amount of Rs.1,00,000/- in this court within a period of two weeks from today with due intimation to the Appellant.

(ii) In case the Appellant is so advised, the Appellant may withdraw that amount within a period of six weeks from today.

(iii) In case within a period of six weeks, as aforesaid, the Appellant applies for withdrawal of the amount, the Prothonotary & Sr.Master shall permit the Appellant to withdraw the amount. If no such application is received by the Prothonotary & Sr.Master within a period of six weeks, the Prothonotary & Sr.Master shall permit the Respondents to withdraw that amount.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)

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